

UNITED STATES OF AMERICA,)	No. CR-10-025-JLQ
)	
Plaintiff,)	ORDER GRANTING MOTION
vs.)	TO LIFT STAY AND TAKING
)	UNDER SUBMISSION
)	
WILLIAM BACON,)	
)	
)	
Defendant.)	
)	
)	

BEFORE THE COURT is Defendant's Motion to Reconsider Order Granting a Stay (ECF No. 96), which asks this court to lift the stay imposed on July 28, 2016. This court has stayed the matter pending disposition of *Beckles v. United States*, No. 15-8544, which is currently pending before the United States Supreme Court. In *Beckles*, the Supreme Court has granted certiorari on the issues of whether the constitutional holding from *Johnson v. United States*, 135 S.Ct. 2251 (2015) applies to the United States Sentencing Guidelines, specifically the residual clause of USSG § 4B1.2(a)(2), and secondly if it does apply, does it apply retroactively to cases on collateral review. The Government filed a Response (ECF No. 98) on September 1, 2016, and Defendant has filed a Reply (ECF No. 99). The Motion was submitted without oral argument.

Defendant's Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255 argues

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1 *Johnson* applies to the so-called ‘residual clause’ of United States Sentencing Guideline
2 § 4B1.2(a)(2), and applies retroactively to this case on collateral review. The Motion
3 contends, “Mr. Bacon’s sentence was enhanced on the basis of a now unconstitutional
4 provision of the U.S. Sentencing Guidelines”. (ECF No. 76, p. 33). Thus, Defendant’s
5 Motion to Vacate presents issues likely to be decided by the Supreme Court in *Beckles*.
6 The court therefore raised the appropriateness of a stay with counsel at oral argument.
7 The Government concurred, but Defendant opposed a stay. The court entered an Order
8 staying the matter on July 28, 2016, and Defendant now seeks reconsideration.

9 This court’s Order (ECF No. 95) cited to several orders in which courts had
10 suggested, or directed, a stay of proceedings pending *Beckles*. Two of those were the
11 Ninth Circuit cases of *Gardner* and *Jacobs*. Defendant now claims “the Ninth Circuit has
12 lifted the stay in *Gardner* and *Jacobs* and directed the district court to address the merits
13 of petitioners’ claims.” (ECF No. 96, p. 2). The lifting of the stay in *Gardner* and *Jacobs*
14 merely allowed a successive petition to be filed. It did not determine the question of
15 *Johnson*’s applicability to the Guidelines, nor did the order direct the district court to
16 address the merits. The August 1, 2016 Orders in *Gardner* and *Jacobs* merely transferred
17 the petitions to the respective district courts.

18 The Sixth Circuit thoughtfully addressed this issue in *In re: Embry*, __F.3d__,
19 2016 WL 4056056 (6th Cir. July 29, 2016). Although the Sixth Circuit has already found
20 *Johnson* applies to the Guideline’s residual clause, the court acknowledged such holding
21 did not answer the question of whether a successive § 2255 petition should be allowed.
22 A successive petition requires a new rule “made retroactive to cases on collateral review
23 by the Supreme Court.” *Id.* at *1 citing 28 U.S.C. 2255(h)(2). With *Beckles* pending, the
24 Sixth Circuit considered the best manner in which to process these claims, and concluded:
25 “it makes the most sense to grant the gatekeeping motions, send the cases to the district
26 courts, and ask the district courts to hold the cases in abeyance pending the Supreme
27 Court’s decision in *Beckles*.” *Id.* at *4. The Sixth Circuit favors allowing an inmate who

1 is raising a *Johnson*/Guidelines challenge to file a successive § 2255 petition, but then
2 recommends the district court stay the action pending *Beckles*.

3 Defendant objects to the stay as “indefinite”, but that is not a completely accurate
4 characterization. This court’s Order stayed the matter pending “disposition” of *Beckles*.
5 There is near certainty *Beckles* will be disposed of by the end of the next Supreme Court
6 term in June 2017, whether via decision on the merits or as Defendant suggests,
7 a dismissal as improvidently granted or affirmance by an equally divided court. The
8 court does not view as “indefinite” a stay of at most 9 or 10 months. The Supreme Court
9 may rule in a prompt fashion, as it did last year in *Welch v. United States*, where the court
10 held *Johnson* applies retroactively to cases on collateral review. *Welch* was decided less
11 than three weeks after oral argument.

12 Defendant also cites to *Yong v. INS*, 208 F.3d 1116 (9th Cir. 2000) and *Jones v.*
13 *Shell*, 572 F.2d 1278 (8th Cir. 1978) in support of the argument that it is inappropriate to
14 stay a habeas petition. Although the *Yong* decision does not preclude the issuance of a
15 stay in a habeas proceeding, the court did state: “habeas proceedings implicate special
16 considerations that place unique limits on a district court’s authority to stay a case in the
17 interests of judicial economy.” *Id.* at 1120. Defendant argues he will suffer prejudice
18 from a stay and is serving an “unlawful sentence.” (ECF No. 96, p. 9). The statutory
19 maximum sentence on the crime of conviction is 10 years, and Defendant has served
20 approximately six and a half years. He has not served a period of time that exceeds the
21 amount authorized by his conviction.

22 The *Yong* court instructs when evaluating a stay in a habeas proceeding, the court
23 “must balance the length of the stay against the strength of the justification given for it.”
24 208 F.3d at 1119. The Government now argues in favor of the stay, but the issue was
25 first raised by the court, and Defendant has strenuously opposed the stay. The
26 Government argues the stay “is based on reasonable grounds and is tailored to minimize
27 any undue delay.” (ECF No. 98, p. 9). The Government states a *Beckles* decision “would

1 appear to have great weight on the issues decided in Defendant's Motion," but then
2 further states it "does not believe the Supreme Court's decision in *Beckles* should impact
3 the Court's ruling." (ECF No. 98, p. 3). In Reply, Defendant argues "any further delay
4 of the consideration of his petition results in him serving time under an unconstitutional
5 sentence." (ECF No. 99, p. 7). Of course, Defendant's prejudice argument relies on the
6 assumption his petition will be meritorious. In contrast, the Government argues that
7 even if the Supreme Court were to rule in *Beckles* that *Johnson* applies to the Guidelines,
8 Defendant would still not be entitled to relief.

9 **II. Conclusion**

10 A stay in this matter was an appropriate course of action. The court rejects
11 Defendant's argument the stay issued herein implicates the Suspension Clause of the
12 Constitution. The issuance of a stay is discretionary, and the Ninth Circuit has instructed
13 in evaluating a stay in a habeas proceeding, the court "must balance the length of the stay
14 against the strength of the justification given for it." *Yong*, 208 F.3d at 1119. The court
15 has considered it first raised the issue of a stay *sua sponte*, and Defendant strenuously
16 opposes a stay as evidenced by the Motion to Reconsider. The court has considered the
17 Government's position, which defends a stay, but acknowledges a decision in *Beckles*
18 may not impact consideration of the petition. The court has also considered the briefing
19 schedule in *Beckles* extends through October and it has not yet been calendared for oral
20 argument¹. These considerations have led the court to exercise its discretion and lift the
21 stay. This Order is not an expression in any manner of the merits of the Motion to Vacate
22 (ECF No. 76).

23 **IT IS HEREBY ORDERED:**

24 1. Defendant's Motion to Reconsider Order Granting a Stay (ECF No. 96) is
25 **GRANTED.**

26 2. The Motion to Vacate (ECF No. 76) has been fully briefed and argument was

27 ¹Per calendar and docket available at www.supremecourt.gov last visited Sept. 7, 2016.
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1 heard. The Motion is now deemed submitted for decision.

2 **IT IS SO ORDERED.** The Clerk shall enter this Order and furnish copies to
3 counsel.

4 Dated this 7th day of September, 2016.

5 s/ Justin L. Quackenbush
6 JUSTIN L. QUACKENBUSH
7 SENIOR UNITED STATES DISTRICT JUDGE
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